TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, TRUSTEE OF THE ESTATE OF MARSHALL RENO MATLEY, FORMERLY DOING BUSINESS UNDER THE NAME AND STYLE OF MATLEY'S FOOD STORES, PETITIONER,

vs.

VERNA MAY MATLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1942.

CERTIORARI GRANTED JANUARY 4, 1943.

No. 10028

United States

Circuit Court of Appeals

For the Ninth Circuit.

G. E. MYERS, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of MATLEY'S FOOD STORE, Bankrupt,

Appellant,

vs.

VERNA MAY MATLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

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(Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.)

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

Messrs. PAINTER, WITHERS & EDWARDS,
153 N. Virginia St.,
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For the Appellant.

Messrs. W. M. KEARNEY and
ROBERT TAYLOR ADAMS,
Gazette Building,
Reno, Nevada,
For the Appellee. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States,
in and for the District of Nevada

No. 683

In the Matter of

MARSHALL RENO MATLEY

formerly doing business under the name and style of MATLEY'S FOOD STORE,

Alleged Bankrupt.

PETITION IN BANKRUPTCY

To the Honorable the District Court of the United States, in and for the District of Nevada:

The Petition of:

Reno Grocer Co., a corporation organized and existing under and by virtue of the laws of the State of Nevada, having its principal office and place of business in Reno, Washoe County, Nevada;

A. Levy & J. Zentner Co., a corporation organized and existing under and by virtue of the laws of the State of California, and duly qualified to do business in the State of Nevada, with its principal office and place of business in Nevada, in Reno, Washoe County, Nevada;

Humphrey Supply Co., a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its office and principal place of business in Reno, Washoe County, Nevada;

Respectfully shows:

1. That Marshall Reno Matley has been a citizen and resident [2] of Fernley, Lyon County,

Nevada, for more than six months next last past; that during said period he was engaged in the retail grocery business under the name and style of Matley's Food Store, also sometimes referred to as Fernley Mercantile Store, at Fernley, Lyon County, Nevada.

2. That the said Marshall Reno Matley owes debts in excess of the sum of $1,000.00 and is not a wage earner or a person engaged chiefly in farming or the tillage of the soil.

3. That your petitioners are creditors of the said Marshall Reno Matley, having provable claims against the said alleged bankrupt amounting in the aggregate, in excess of all securities held by them, to the sum of more than $500.00.

4. That the nature and amount of your petitioners' claims are as follows;

An open account for goods, wares and merchandise sold and delivered by the said Reno Grocer Co., a corporation, to the said alleged bankruptcy, within the two years last past, in the sum of $548.47.

An open account for goods, wares and merchandise sold and delivered by the said A. Levy & J. Zentner Co., a corporation, to the said alleged bankrupt within the two years last past, in the sum of $560.33.

An open account for goods, wares and merchandise sold and delivered by the said Humphrey Supply Co., a corporation, to the said alleged bankrupt within the two years last past, in the sum of $78.05.

Your petitioners further represent:

5. That a receiver or trustee was appointed and put in charge of the property and business of said alleged bankrupt while insolvent in that, in the case of Verna May Matley, Plaintiff, vs. Marshall Reno Matley, defendant, being Case No. 65,129, in Dept. No. 2, of the Second Judicial District Court [3] of the State of Nevada, in and for the County of Washoe, the court entered an order on the 18th day of September, 1940, that the Nevada Board of Trade, Inc., be appointed custodian of said business known as Matley's Food Store in Fernley, Nevada, and have the right to take possession thereof and to conduct said business, and to attempt to consummate a sale thereof subject to the approval of the court; that pursuant to said order the said Nevada Board of Trade, Inc., on said day, took possession of said store and did operate the same as custodian thereof.

6. That on the 24th day of October, 1940, the said Marshall Reno Matley, wrote a letter to the Nevada Board of Trade, Inc., reading as follows:

"Reno, Nevada.
October 24, 1940

Nevada Board of Trade, Inc.
27 Stack Building
Reno, Nevada

Gentlemen:

Replying to your repeated demands that I pay various creditors represented by you, I can

only inform you that I am completely unable to make any payment upon my debts.

I am aware of the fact that you have advised me that a bankruptcy petition will undoubtedly be filed against me. However, there is nothing that I can do about the matter.

Since I am completely unable to pay my debts, I am willing to be adjudged a bankrupt upon this ground in the event a bankruptcy proceeding is instigated by my creditors.

Very truly yours,

MARSHALL RENO MATLEY"

Wherefore your petitioners pray that service of this petition, with subpoena, be made upon the said Marshall [4] Reno Matley as provided in the Acts of Congress relating to bankruptcy, and that the said Marshall Reno Matley be adjudged a bankrupt within the purview of said Acts.

Respectfully submitted,

(Seal) RENO GROCER CO.

By J. M. BLAKLEY,

Treasurer

A. LEVY & J. ZENTNER

By RALPH S. CASEY

Resident Manager

(Seal) HUMPHREY SUPPLY CO

By W. E. FUHRMAN,

Vice President

State of Nevada,
County of Washoe—ss.

On this 24th day of October, 1940, personally appeared before me, Myrta McCarthy, a Notary Public in and for the County of Washoe, State of Nevada, J. M. Blakley, known to me to be the Treasurer of Reno Grocer Co., a corporation, Ralph S. Casey, known to me to be the Resident Manager of A. Levy & J. Zentner Co., a corporation, and W. E. Fuhrman, known to me to be the president of Humphrey Supply Co., a corporation, the corporations that executed the foregoing Petition, and upon oath, each for himself and not one for the other, did depose that he is the officer of said corporation as above designated; that he is acquainted with the seal of said corporation, and that the seal affixed to the said petition is the corporate seal of said corporation; that the signature to said instrument was made by him as such officer of said corporation as indicated after his said signature, and that said corporation executed the said petition freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

(Seal) MYRTA McCARTHY
Notary Public in and for the County of Washoe, State of Nevada

[Endorsed]: Filed Oct. 24, 1940. [5]

[Title of District Court and Cause.]

PETITION

Comes now the petitioner, Verna May Matley, and states:

1. That petitioner is and since April 22, 1930 has been the wife of Marshall Reno Matley, the above named bankrupt, and since that date they have been and now are residents of the State of Nevada.

2. That petitioner now is and since prior to the commencement of the above entitled cause has been in the possession of and residing at those certain premises known as No. 316 Caliente Street, Reno, Nevada, said premises being described as Lot 11 of Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada, using and claiming and with the intention to use and claim said premises as a homestead; that by virtue of the laws of the State of Nevada, and especially Article IV Section 30, Constitution of Nevada (81 N. C. L. 1929) and Section 3315 Nevada Compiled Laws 1929, either petitioner or the bankrupt above named, or both, is entitled to a right to a homestead in said premises and the exemption thereof.

3. That said real estate was listed by said bankrupt in [6] Schedule B-1 filed herein by said bankrupt on November 6, 1940, but that said bankrupt failed and refused and still fails and refuses to claim said premises as exempt, although entitled so to claim under the laws of the United States and of the State of Nevada; that petitioner claims the

exemption of said premises as a homestead; that petitioner is in necessitous circumstances and has no other home than said premises; that said bankrupt has failed and continues to fail to provide petitioner with the common necessaries of life; that unless said homestead is exempted and recognized petitioner will be deprived of a home.

4. That petitioner owns, and for a long time prior to the commencement of the above entitled cause has had possession of and owned as her separate property a certain 1934 Ford sedan, and the above named bankrupt and the trustee herein have not had nor has either of them had any interest therein or right thereto nor do they or either of them have any interest or right therein.

5. That in Schedule B-2 filed herein by said bankrupt on November 6, 1940 said bankrupt listed said automobile as his personal property, whereas at that time, prior thereto and since then, said automobile was and is the separate property of this petitioner; that petitioner is entitled to the said automobile and the possession thereof.

6. That the personal separate property of said bankrupt and a large portion of the personal community property of petitioner and said bankrupt have been in the sole custody of said bankrupt, and petitioner is without knowledge as to the exact nature of said property; that if there are other exemptions than those herein claimed or set forth in Schedule B-5 herein which are proper and allowable by law, petitioner claims said exemptions. [7]

Wherefore, petitioner prays that said premises be declared exempt and set aside and recognized as a homestead; that said auto mobile be set aside and it be declared that neither said bankrupt nor the trustee herein has any right or interest therein; that any exemptions not heretofore claimed to which it may appear that said bankrupt shall be entitled, shall be allowed; that the bankrupt's said schedules be amended so as to show and claim said exemptions and the title and right of possession of said automobile in petitioner, and that petitioner be allowed such other and further relief as may be meet and proper; that the court order and direct said bankrupt to amend his said schedule so that it shall include all exemptions allowable by law and eliminate all assets not belonging to the bankrupt.

Dated: November 23, 1940.

(s) W. M. KEARNEY

Attorney for Petitioner [8]

State of Nevada,
County of Washoe—ss.

Verna May Matley, being first duly sworn, deposes and says: That she is the petitioner above named; that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

(s) VERNA MAY MATLEY

Subscribed and sworn to before me this 23rd day of November, 1940.

(Notarial Seal) GEORGIA NEWMAN
Notary Public in and for Washoe County, Nevada

[Endorsed]: Filed Nov. 27, 1940. [9]

MINUTES OF COURT,

November 27, 1940

[Title of District Court and Cause.]

At this time appears Robt. T. Adams, Esq., representing Wm. M. Kearney, Esq., and presents to the Court petition of Verna May Matley for exemption of certain property of the bankrupt. Upon motion of Mr. Adams, it is ordered that the petition of Verna May Matley be filed and referred to Hon. Arthur F. Lasher, Referee in Bankruptcy.

[10]

"EXHIBIT A"

DECLARATION OF HOMESTEAD

Know All Men by These Presents:

That the undersigned, Verna Mae Matley, hereby declares that she is married to Marshal R. Matley; that at the time of making this declaration she is residing with her family on those certain premises known as 316 Caliente Street, Reno, Nevada, said premises being described as Lot 11 of Block 20,

Sierra Vista Tract, Reno, Washoe County, Nevada, and consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, with the intention to use and claim the said premises as a homestead.

Dated: October 23, 1940.

(s) VERNA MAE MATLEY

State of Nevada,
County of Washoe—ss.

On this 20th day of November, A. D. 1940, personally appeared before me, the undersigned, a Notary Public in and for said County of Washoe, Verna Mae Matley, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my Official Seal at my office in the County of Washoe, the day and year in this certificate first above written.

(Notarial Seal) GEORGIA NEWMAN
Notary Public in and for the County of Washoe, State of Nevada.

My Commission expires May 22, 1944. [11]

[Endorsed]: Copy 94134. Filed for record at the request of ..... Nov. 20, 1940 at 7 minutes past 4 o'clock P. M. Recorded in Volume C of Declarations of Homestead page ..... et seq.,

Records of Washoe County, Nevada. Delle B. Boyd, County Recorder. By ..... Deputy. Fee for recording $1.15. Copied .....
Indexed ..... Verified .....
(In red pencil)

Admitted in evidence as Exhibit "A" Trustee Dec. 6, 1940. Arthur F. Lasher, Referee in Bankruptcy. [12]

[Title of District Court and Cause.]

TRUSTEE'S REPORT ON EXEMPTION CLAIM OF VERNA MAY MATLEY

Now comes G. E. Myers, trustee in the above entitled matter, and objects to the granting of the Petition of Verna May Matley filed herein on the 27th day of November, 1940, wherein the said Verna May Matley petitions the Court to declare the dwelling at 316 Caliente Street, Reno, Nevada, exempt as a homestead, and to exempt a certain 1934 Ford sedan shown in the schedules filed herein by the bankrupt upon the ground that the same is the separate property of the said petitioner, Verna May Matley, upon the following grounds, to wit:

1. That said claim for exemption was not filed at the time of the filing of the bankrupt's schedules herein on the 6th day of November, 1940, nor within five (5) days thereafter, although William M. Kearney, Esq., attorney for said Verna May Mat-

ley, was notified of the pendency of said bankruptcy proceeding on the 26th day of October, 1940.

2. That no declaration of homestead as required by law was filed by the bankrupt or by the bankrupt's said wife, [13] Verna May Matley, prior to the filing of the petition in bankruptcy herein on the 24th day of October, 1940.

3. That said property can not be claimed as a homestead in fact because it was not occupied by the bankrupt and his said wife as a homestead at the time of the filing of this bankruptcy proceeding; that for some years past the bankrupt has been a resident of Fernley, Nevada, and that within the four (4) years last past the only place that the bankrupt and his said wife lived together as man and wife, was in Fernley, Nevada, and hence, if the bankrupt is entitled to any homestead, it would be the ranch property constituting the last marital domicile of the bankrupt and his said wife.

4. That the evidence affirmatively shows that the bankrupt and his said wife have no children and have been living separate and apart, and that neither the bankrupt nor his said wife can claim a homestead unless they show that they were occupying the said premises as man and wife, or as the head of a family, and that, as a matter of law, the homestead will not be granted to an individual not living with husband or wife or with other dependents.

5. That said 1934 Ford sedan, according to the

testimony of said Verna May Matley, was purchased from the community assets and hence, is community property, and that one automobile truck by which the bankrupt habitually earns his living has already been declared exempt to the bankrupt, and the bankrupt is not entitled to the exemption of a second automobile.

Wherefore, your trustee prays that said petition of Verna May Matley be disallowed, and that said property and said 1934 Ford sedan be declared to be assets of said estate.

G. E. MYERS,
Trustee. [14]

United States of America,
State & District of Nevada,
County of Washoe—ss.

G. E. Myers, being first duly sworn on his oath, deposes and says:

That he is the duly elected and qualified trustee in the Matter of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, Bankrupt; that he has read the foregoing Trustee's Report on Exemption Claim of Verna May Matley, and that the same is true of his own knowledge except as to those matters and things therein stated on information and belief, and as to those matters, he believes it to be true.

G. E. MYERS.

Subscribed and sworn to before me this 16th day of December, 1940.

(Notarial Seal) ADELENA PAGNI,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Dec. 16, 1940. [15]

[Title of District Court and Cause.]

OPINION OF REFEREE ON EXEMPTION CLAIM OF VERNA MAY MATLEY.

On October 24, 1940, certain creditors filed a petition in involuntary bankruptcy against Marshall Reno Matley. On the same date the alleged bankrupt filed an Answer to the Petition whereby he admitted the material allegations thereof. On the same day an Order was made by the Court adjudging Marshall Reno Matley a bankrupt.

The first creditors meeting was held on the 8th day of November, 1940, at which G. E. Myers, of Reno, was elected trustee. Mr. Myers thereafter duly qualified as trustee.

Pursuant to an Order of the Referee, the bankrupt, on November 6, 1940, filed Schedules of his debts and assets with the Referee. Therein he claimed certain property as exempt, but he made no claim of a homestead exemption. In his Schedule B the bankrupt listed as his property real estate consisting of a dwelling house and lot, known as No. 316 Caliente Street, Reno, Nevada, and a

1934 Ford Sedan Automobile. He made no claim of exemption as to either of the said items. [16]

On December 10, 1940, the Trustee filed a report in which he recommended the allowance of the exemptions as claimed by the bankrupt in his Schedule B-5. The property thus exempted did not include the real estate at No. 316 Caliente, nor did it include the Ford Sedan Automobile.

On November 27, 1940, Verna May Matley, the wife of the bankrupt, filed herein a Petition whereby she claimed a homestead in the premises at No. 316 Caliente Street, and whereby she claimed the ownership of the Ford Sedan Automobile as her separate property.

On December 16, 1940, the Trustee filed a Report upon the said Petition of Verna May Matley, whereby he prayed that the homestead claim be disallowed and that the Ford Sedan Automobile be declared to assets of the bankrupt estate.

The matter came on for hearing before the Referee at the Reno City Hall on December 6, 1940, upon the said petition of said Verna May Matley. A further hearing was had thereon on the 16th day of December, 1940. Thereafter briefs were filed by the respective parties, the matter being submitted upon the filing of the petitioner's closing brief on March 27, 1941. The two matters presented for determination will be separately considered.

The Homestead Claim:

Upon the facts the Referee finds that petitioner and the bankrupt were married to each other on

April 22, 1931, and that the marriage has ever since continued. That petitioner and her husband purchased the lot at 316 Caliente Street, in the City of Reno and built a house thereon. They lived on the Caliente Street property for a year and two months. (Transcript p. 4, lines 3-8 Incl.) That the money for the initial down payment on the house was money she and her husband, the bankrupt, earned after marriage. That they borrowed the money [17] to build the house and that they made the payments thereon out of their joint earnings and out of rentals received from the house, which they rented. That the house was built in 1935, approximately five years after their marriage to each other. (Transcript pp. 13 to 15, line 7.)

The Referee further finds that Mr. and Mrs. Matley moved to Wadsworth in April, 1936, on to a ranch owned by a Mrs. Lee which they subsequently purchased. (Transcript p. 19, lines 1 to 12.) Thereafter they moved to Fernley and lived on a ranch which they purchased and which is shown on the Schedule of the bankrupt. (Transcript p. 19, lines 12-17.)

The Caliente Street property, which is the subject matter of the claim, the Referee finds to be community property.

There was offered and admitted in evidence as Trustee's Exhibit "A" a copy of a declaration of homestead filed by Verna May Matley covering the Caliente Street property. The Declaration is signed by Mrs. Matley. It bears date the 23rd day of Octo-

ber, 1940. It was acknowledged as shown by the notarial certificate on November 20, 1940, and was recorded on the same day in Book C of Declarations of Homestead, Records of Washoe County, Nevada.

It is contended on behalf of the Trustee that the decision of the Supreme Court of the United States in White v. Stump, 266 U. S., 310, 69 L. Ed., 301, is controlling in this case.

The facts in White v. Stump are that Stump, who was adjudged a bankrupt on his voluntary petition, did not in his petition or schedule claim a homestead exemption in "a quarter section of land on which he and his family had been and were residing." "Two months later the bankrupt's wife, with *is* assent, asked that the land be set apart as an exempt homestead [18] for their joint benefit." The exemption was disallowed by the Referee at a hearing, on the trustee's objection. No declaration of homestead was made and filed for record until a month after Stump's petition in bankruptcy was filed and he was adjudged a bankrupt.

The Supreme Court said, in reference to the State law under construction (Page 302 of L. Ed., column):

> "The laws of the State of Idaho, where the land is situate, provide for a homestead exemption, but only where a declaration that the land is both occupied and claimed as a homestead is made and filed for record, as therein prescribed.

If the family consist of husband and wife, whether with or without children, either may make the declaration, * * * The exemption arises when the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents the sale under it."

The Court further said, page 302 of L. Ed., Column 2:

"The Bankruptcy law does not directly grant or define any exemptions, but directs, in Section 6, that the bankrupt be allowed the exemptions 'prescribed by the State law in force at the time of the filing of the petition'; in other words, it makes the State law existing when the petition is filed the measure of the right of exemptions. It further provides that a voluntary bankrupt shall claim the exemptions to which he is entitled in a schedule filed 'with the petition', and an involuntary bankrupt shall claim his in a schedule filed within ten days after the adjudication, unless further time be granted (sec. 7, cl. 8); that the trustee shall set apart the exempt property and report the same to the court as soon as practicable after his appointment (sec. 47a, cl. 11); that the trustee shall be vested by operation of law with the title of

the bankrupt to all property, in so far as it is not exempt, which, 'prior to the filing of the petition,' he could by any means have transferred, or which might have been levied upon and sold under judicial process (sec. 70a); and that the bankrupt shall be given a discharge releasing him from debts owing 'at the time of the filing of the petition'. (secs. 17 and 63)

"These and other provisions of the Bankruptcy Law show that the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. This has been recognized in our decisions. * * * When the law speaks of property which is exempt and of rights to exemptions, it, of course, refers to some point of time. In our opinion this point of time is the one as of which the general [19] estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The provisions before cited show —some expressly and others impliedly—that one common point of time is intended, and that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt' (sec. 70a). The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were

performed, but of property to which there is, under the State law, a present right of exemption,—one which withdraws the property from levy and sale under judicial process.

"The land in question here was not in that situation when the petition was filed. It was not then exempt under the State law, but was subject to levy and sale. One of the conditions on which it might have been rendered exempt had not been performed. Under the State law the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to create a homestead exemption."

It will be noted that, in the foregoing opinion, the Supreme Court is speaking of property "to which there is, UNDER THE STATE LAW, a present right of exemption,—one which withdraws the property from levy and sale under judicial process." And again, in deciding that the failure to file the homestead declaration before the filing of the petition in bankruptcy was fatal to the exemption, the Court says, "UNDER THE STATE LAW the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to create a homestead exemption." What the foregoing decision in White v. Stump accomplishes is to fix the point of time as of which the exemption rights UNDER THE STATE LAW are to be tested.

Turning now to the home which had been occupied by the claimant, Verna May Matley and her husband, in 1935, remembering that no declaration of homestead was filed in the office of the Recorder of Washoe County, Nevada, until nearly a month after the filing of the original petition by the creditors in this bankruptcy, and giving full effect to the decision in White v. Stump, it may be asked what rights, if any, to a homestead ex- [20] emption remain to Mrs. Matley.

By virtue of Section 6 of the Bankruptcy Act "the State law governs as to exemptions in bankruptcy." 3 Remington on Bankruptcy, sec. 1292.

In Lachman v. Walker, 15 Nev. 422, the sheriff had levied execution upon real property which had been occupied as a home by the judgment debtors for more than four years prior to Jan. 7, 1879. The judgment in favor of one Rinaldo, had been recovered and docketed in Sept. 1878. On Jan. 7, 1879, the judgment debtors conveyed the property to the plaintiffs. The sheriff's levy was made Jan. 30, 1879. Plaintiff thereupon brought the action to enjoin the sheriff from selling the property under the levy. "The court below sustained defendant's demurrer to the complaint, because it did not appear therefrom that the grantors of plaintiff had at any time availed themselves of the benefits of the homestead act, or had selected the premises according to the provisions of said act."

The Supreme Court said, page 423:

"Plaintiffs refused to amend their complaint and a judgment of dismissal was ordered and entered. This appeal is from that judgment, and but one question is presented for our consideration, viz.: Is compliance with the first section of the homestead statute (Comp. L. 186), in relation to the manner of selection, a condition precedent to the exemption therein provided, when, as in this case, the premises were actually occupied as the home of the judgment debtor, and might have been selected and held as a homestead according to the provisions of the statute?"

The Court then quotes section 1 of the Homestead Act of this State, the material parts of which correspond with the present act, following which the Court said: (Page 424).

"In this case no declaration has even been filed, and we have not the slightest doubt that the property is not exempt. The statute only exempts a homestead which has been selected according to its provisions. 'The homestead * * * to be selected * * * shall not be subject to forced sale. * * * Said selection shall be made by either husband or wife, or both of them. * * * declaring their intention in writing to claim the same as a homestead.' [21]

"The law does not compel any person to have his property become a statutory homestead,

against his will, BUT IT REQUIRES HIM TO DO CERTAIN THINGS IN ORDER TO ENJOY ITS BENEFITS."

No Nevada case has been cited which overrules the decision of Lachman v. Walker to the effect that the filing of a declaration is necessary to exempt the homestead from a sale under execution. The Court in the Lachman case expressly excluded from its decision any opinion as to what would have been the effect of a homestead declaration filed by the debtors after the docketing of the judgment but before the sale and prior to the conveyance of the property by the debtors.

In the case of Hawthorne v. Smith, 3 Nev. 164, the home of W. A. Hawthorne and wife had been attached in a suit against the husband. After the levy of attachment but before judgment the Hawthornes filed a declaration of homestead on the property. The attachment plaintiff having thereafter recovered judgment and levied execution on the home, the sheriff advertised the same for sale. Whereupon Hawthorne and wife brought the action to restrain the sheriff from selling the property. After quoting Sec. 30, Art. IV, of the Constitution of the State of Nevada providing that "A homestead, as provided by law, shall be exempt from forced sale under any process of law. . . .", and secs. 1 and 2 of the Homestead Act of 1865, the Supreme Court concludes, as follows; bottom of page 169:

"As the law is totally silent as to the time when a selection shall be made of a homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that after the selection is made and filed for record, no levy upon or sale of the homestead property, can be legally made, except for those classes of debts mentioned in the Constitution."

The Referee is of the opinion that the principles laid down in Lachman v. Walker and in Hawthorne v. Smith are now the settled law in Nevada; and that in this State it is necessary [22] to file a declaration of homestead in order to obtain an exemption of the homestead which is good as against an execution sale, but that the declaration, if filed at any time before the actual sale, is effective to prevent the sale.

The question came before the United States Circuit Court, District of Nevada, in the case of Nevada Bank of San Francisco v. Treadway, 17 Fed. 667. This was an action in ejectment brought by the plaintiff bank against Treadway. The complaint alleged that the plaintiff bank had sued to recover a sum of money and levied attachment upon the land in question; that judgment was recovered, execution levied thereunder on said land; and that the land was sold thereunder on August 5, 1881,

after due notice given. The complaint further showed that on August 1, 1881, the defendants intermarried and on the same day filed a declaration of homestead on said land.

The Circuit Court discussed the cases of Lachman v. Walker, 15 Nev. 422 and Hawthorne v. Smith, 3 Nev. 182, and held on authority of the latter case that the sale made by the sheriff on August 5, 1881, after the filing of the Declaration of Homestead on August 1, 1881, was wholly void.

With the above two principles of Nevada law in mind, namely, (1) that it is necessary to file a declaration to exempt a homestead from an execution sale, and (2) that such declaration is effective if filed prior to the actual sale, the effect of the case of White v. Stump, 69 L. Ed., 301, upon the right of Mrs. Matley to a homestead exemption is now again considered.

The reason of the rule in White v. Stump, fixing the time of the filing of the petition as the time as of which the right to an exemption is to be tested, is that "this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status [23] and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed."

With the above reason in mind, it may now be asked (1) what changes took place in the status and rights of the bankrupt and the trustee at the filing of the original petition in this bankruptcy on October 24, 1940, and (2) what effect, if any,

have such changes on the right of Mrs. Matley to a homestead exemption in this case? Such changes are declared in Section 70 of the Bankruptcy Act, as amended by the Chandler Act, and the material parts thereof are as follows:

Bankruptcy Act, Sec. 70a (U. S. C. A., sec. 110):

"The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * to all * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, * * *."

Bankruptcy Act, Section 70c, last sentence of paragraph:

"The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists: * * *"

The phrase, "date of bankruptcy," which occurs repeatedly in the above quotation, is defined in Section 1, sub-division a, clause (13) of the Bankruptcy

Act as meaning "the date when the petition was filed." Restating the foregoing in condensed form, it may be said that the trustee in this case is vested as of October 24, 1940, the date of the filing of the original petition, with:

1. The title of the bankrupt to all property which the bankrupt could by any means have transferred prior to the 24th day of October, 1940;

2. The title of the bankrupt to all property "which might have been levied upon and sold under judicial [24] process against him;"

3. The rights, remedies, and powers of a creditor then holding a lien by legal or equitable proceedings upon the premises claimed as a homestead;

We may now briefly consider the rights of Mrs. Matley to the homestead in relation to each of the foregoing rights which vested in the trustee as of October 24, 1940, remembering that her Declaration of Homestead was filed with the Recorder of Washoe County on November 20, 1940, reserving the second item to be considered last in order.

1. Homestead rights of Mrs. Matley as against the Trustee's title to property which Reno Marshall Matley, the bankrupt could by any means have transferred prior to October 24, 1940.

First of all the Trustee acquired by Section 70, sub-division a, clause (5), "the title of the bankrupt as of the date of the filing of the petition in bank-

ptcy * * * to all * * * property * * * which prior to the filing of the petition he could by any means have transferred * * *." But the homestead here in question could not have been transferred by the husband prior to the filing of the petition, for section 3360 Nevada Compiled Laws, being the section which invests the husband with the entire management and control of the community property, provides "that NO DEED OF CONVEYANCE—OR MORTGAGE OF A HOMESTEAD AS NOW DEFINED BY LAW, REGARDLESS OF WHETHER A DECLARATION THEREOF HAS BEEN FILED OR NOT, SHALL BE VALID FOR ANY PURPOSE WHATEVER UNLESS BOTH THE HUSBAND AND WIFE EXECUTE AND ACKNOWLEDGE THE SAME AS NOW PROVIDED BY LAW FOR THE CONVEYANCE OF REAL ESTATE." Under the above section, it was held by the Supreme Court of Nevada, in First National Bank of Ely v. Meyers, 39 Nev. 235, that

> "Though the homestead was not registered as required by law, the husband's sole conveyance or incumbrance of it cannot pass title."

Hence the trustee took no title to the property claim- [25] ed as a homestead, under the first point considered, because Reno Marshall Matley, the bankrupt, could not have transferred this property prior to October 24, 1940. Mrs. Matley's claim of Homestead was good as against Item No. 1.

3. Homestead rights of Mrs. Matley as against the Trustee, vested on October 24, 1940, with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings upon the property claimed as a homestead.

Under the doctrine of Hawthorne v. Smith, 3 Nev. 164, Mrs. Matley's homestead declaration filed November 20, 1940, would be effective to prevent a sale of the property by a creditor holding such a lien. Insofar as the Trustee merely stands in the shoes of such creditor, the homestead declaration would be effective to prevent a sale under the lien.

2. Homestead rights of Mrs. Matley, as against the tristee holding the title of the bankrupt on October 24, 1940, to all property which might have been levied upon and sold under judicial process against the bankrupt.

Of the effect of Division (5) of Sec. 70a of Bankruptcy Act it is said in Gilbert's Collier on Bankruptcy (4th Ed.), page 1182:

"Subdivision 5 passes to the trustee all property which prior to the filing of the petition he (the bankrupt) could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' It is the broadest and most comprehensive of all the subdivisions. It probably includes nearly, if not all, the kinds of property mentioned in the four that precede it, as well as that specified in subdivision 6. It includes everything that

> can properly be the subject of a lawful transfer, whether it be corporeal or incorporeal; every vested right and interest growing out of property."

All of the right, title, and interest of the bankrupt in the property at 316 Caliente Street, and now claimed as a homestead by Verna May Matley, was subject to levy and sale on October 24, 1940, for no homestead declaration had been filed upon the same on that date. Under the doctrine of Lachman v. Walker, 15 Nev. 422, the same was not exempt on said date. It [26] follows that on October 24, 1941, by operation of law the trustee in this proceeding became vested with ALL THE TITLE TO SAID PROPERTY WHICH A CREDITOR MIGHT HAVE OBTAINED BY LEVY AND SALE UPON SAID DATE.

Up to the date mentioned Mrs. Matley could have perfected her claim of homestead by filing a declaration. She had then had over five years from the acquirement of the Caliente Street property in 1935, within which to take this step. On the 24th of October, 1940, however, the trustee in this proceeding held all the title which could have been acquired by levy AND SALE under judicial process against the bankrupt, and the filing of the declaration of homestead on November 20, 1940, came too late.

It is rightly contended by the claimant's counsel that the homestead exemption statute of Idaho which

the Court was construing in White v. Stump differs from the Nevada Statute in that, under the Idaho statute, where a levy is effected before a declaration of homestead is filed, "the subsequent making and filing of a declaration neither avoids the levy nor prevents the sale under it." However, by the second clause of subdivision 5 of section 70a of the Bankruptcy Act, the filing of the petition automatically operates to put the trustee in the position of one who holds under both a levy AND AN EXECUTED JUDICIAL SALE; and thus, under the decision in White v. Stump, the filing of the original petition in bankruptcy before the filing of a homestead declaration bars the homestead exemption as completely under the Nevada Statute as would be the case under the Idaho statute.

The case of White v. Stump, 69 L. Ed., 301, was considered by the Circuit Court of Appeals of the Ninth Circuit in Georgouses vs. Gillen, 24 Fed. (2d) 292. This case involved construction of the Arizona homestead statute, which [27] resembled the Nevada statute in that under it the filing of the declaration at any time before a sale under execution would prevent the sale.

The facts in the Georgouses case were that on January 11, 1926, the four appellants, as co-partners and as individuals were adjudged bankrupt. The land in question was a single tract of dairy land which stood in the name of John G. Georgouses, one of the partners who held it in trust for the partnership. On December 24, 1925, deeds by

John G. Georgouses, purporting to convey to each of the appellants his several interest in the land, were recorded. On January 27, 1926, 16 days after the adjudication, each of the appellants executed and filed for record a claim of homestead covering the individual interest in the land conveyed to him as aforesaid. The appellants set up homestead claims in their schedules, which were denied by the referee and the denial confirmed by the Judge. From the Order of confirmation they appealed.

The Arizona Statute, paragraph 3292 Rev. Statutes Arizona (Civ. Code 1913) provided that, "The homestead shall from the date of the recording the claim of homestead, be exempt from attachment * * * and forced sale, and from sale under any judgment or lien existing prior to the recording of such claim, except a mortgage * * * No such sale made after the recording of the claim of homestead shall be valid or convey any interest in such homestead, whether made under a judgment existing before or after the recording of such claim * * *."

In affirming the judgment of the District Court, the Circuit Court of Appeals said:

> "We find no escape from the view that the case of White v. Stump, 266 U. S. 310, 45 S. Ct. 103, 69 L. Ed. 301, is controlling. True, the Arizona statute is not identical with the state statute there involved, and we are not unmindful that the language of a decision is not infrequently to be understood as qualified by

the specific facts and issues under consideration, BUT [28] IN THAT CASE THE SUPREME COURT APPARENTLY ESTABLISHES A GENERAL STANDARD, THE BASIC PRINCIPLE OF WHICH IS EQUALLY APPLICABLE TO THE INSTANT CASE."

Counsel for the claimant cite the case of Clark v. Nirebaum, 8 F. (2d). 451, in which the Circuit Court of Appeals construed a Georgia homestead exemption statute similar to the Nevada Statute to the extent that in Georgia, as in Nevada, the debtor may move to claim his homestead exemption after the levy but before the sale. In this Nirenbaum case the Court said:

"The true adjustment of bankruptcy to the Georgia exemptions is to treat the filing of the petition in bankruptcy as the equivalent of a levy or attachment on all the bankrupt's property, which he may meet before an actual sale by having the exemptions to which he is entitled, if not previously ascertained, set apart to him by the machinery of the bankruptcy court just as he would do in the state court had state process been levied upon it."

The Referee is of the opinion that, in treating "the filing of the petition in bankruptcy as the equivalent of a levy or attachment on all the bankrupt's property, which he may meet before an actual

sale" the Court in the Georgia case failed to give effect to the provision of division (5) of Section 70a of the Bankruptcy Act which invests the trustee as of the date of filing the petition in bankruptcy with the title of the bankrupt to all property, except exempt property," which might have been levied upon AND SOLD under judicial process against him."

The Referee does not think the case of Clark v. Nirenbaum should be followed in the present proceeding for the further reason that it is in conflict with the case of Georgouses v. Gillen, 24 Fed. (2d) 292 decided by the Circuit Court of Appeals of the Ninth Circuit.

The Referee is of the opinion that the second ground of objection stated by the trustee, viz., "That no declaration of homestead as required by law was filed by the bankrupt or [29] by the bankrupt's said wife, Verna May Matley, prior to the filing of the petition in bankruptcy herein on the 24th of October, 1940," must be sustained.

The Ford Sedan Automobile

The bankrupt's Schedule B-2 contains the following item of personal property:

"1—1934 Ford Sedan (possession of Bankrupt's wife) $100.00".

The above is not claimed as exempt by the bankrupt, but he does claim as exempt one GMC pick-up

truck valued at $100.00, which exemption was allowed him by the trustee.

Mrs. Matley asks for an order setting aside the Ford Sedan Automobile to her upon the ground that her husband turned it over to her as her separate property.

Mrs. Matley testified that her husband turned the car over to her as her separate property some time in 1939; that it had never been out of her possession since she separated from her husband in July, 1940: (Transcript Mrs. Matley's testimony p. 5).

Mrs. Matley further testified of the Ford Sedan that—

> "He (the bankrupt) said the car was mine—mine.
>
> "At the time he bought the truck he gave me the car and the blue slip had been in my name."
>
> (Transcript, page 38, line 5.)

There is some doubt as to just how the car stands at present on the public records. Mrs. Matley's testimony in that respect is as follows:

Transcript, page 21, line 26: (Mrs. Matley)

> "Q. Now with regard to this Ford Sedan—you state that it was your understanding that it was to be your separate property. In whose name was that car registered?
>
> "A. In—it is in Mr. Matley's name.
>
> "Q. At that time was there any effort made to change the registration of the car?
>
> "A. Yes.

"Q. Was it changed to you? [30]

"A. It stands in my name."

Trans. p. 38, line 27 et seq. (Mrs. Matley.)

"Q. In whose name does the car stand in now?

"A. The car is in my name now."

* * * * * *

"Mr. Kearney: (Q.) There was a slip that came back after you had sent in one in your name?

"A. Yes.

"Q. And it was never corrected.

"A. It was never corrected.

"Q. The instruction had been sent in with your slip in your name to re-register it?

"A. Yes."

The testimony shows that the car was purchased with community funds. Mrs. Matley's testimony also shows without contradiction that she had been separated from her husband "the last few months" because of marital differences; that her husband is not providing her with any means of support; and that she has no funds with which to provide for herself. (Trans. page 4)

The bankrupt's schedules verified November 5, 1940, show his total assets to have been $20,354.37 and his total debts to have been $14,911.28 on that date. There was no evidence introduced tending to show the insolvency of the bankrupt at the time of the transfer of the car or at the time of the

separation of the debtor from her husband, the bankrupt.

The Referee finds that the said Ford Sedan Automobile is the separate property of the petitioner and that she is entitled to an order setting the same apart to her.

It is ordered that the 1934 Ford Sedan Automobile mentioned in the Schedules and in the petition of Verna May Matley, herein, be set apart to her as her separate property.

It is further ordered that the petition of said Verna May Matley praying that the premises known as No. 316 Caliente Street, Reno, Nevada, also described as Lot 11 of Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada, be declared [31] exempt and set aside and recognized as a homestead, be and the same hereby is denied.

Dated at Reno, Nevada, this 11th day of June, A. D. 1941.

(s) ARTHUR F. LASHER
Referee in Bankruptcy

[Endorsed]: Filed June 11, 1941. Arthur F. Lasher, Referee in Bankruptcy.

[Endorsed]: Filed July 16, 1941. O. E. Benham, Clerk. [32]

[Title of District Court and Cause.]

AMENDED APPEAL AND PETITION FOR REVIEW.

Comes now Verna May Matley, your petitioner herein, and appeals from all that portion adverse to petitioner of a certain order made on June 11, 1941, in the above-entitled case and petitions for a review of said portions of said order and in this connection states:

I.

That said order was made on June 11, 1941, by Arthur F. Lasher, Referee in Bankruptcy, to whom the above matter was referred; that appeal is taken from that portion of said order reading:

> "It Is Further Ordered that the petition of said Verna May Matley praying that the premises known as No. 316 Caliente Street, Reno, Nevada, also described as Lot 11 of Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada, be declared exempt and set aside and recognized as a homestead, be, and the same hereby is, denied."

II.

That said order was and is erroneous in that the referee erred as a matter of law in denying the petition of petitioner herein with reference to said property and in failing to declare exempt, set aside and recognize as a homestead, the [33] said property. The referee erred in holding that the filing of

the petition in bankruptcy had the effect of a judicial sale of the homestead property involved herein, so as to avoid the validity of a claim of homestead, the formal declaration thereof being filed after the filing of the petition in bankruptcy and to cut off the exemption of a homestead recognized by the laws of *the* Nevada and decisions of the Courts of Nevada. The referee erred in refusing to recognize, set aside and declare exempt the said property claimed by your petitioner as a homestead after ruling (page 10 of said opinion) that

> "The Trustee took no title to the property claimed as a homestead, under the first point considered, because Reno Marshall Matley, the bankrupt, could not have transferred this property prior to October 24, 1940. Mrs. Matley's claim of Homestead was good as against Item No. 1." (Page 10, lines 28-32)

Said Item No. 1 being stated as (page 10, lines 6 and 7):

> "1. Homestead rights of Mrs. Matley as against the Trustee's title to property which Reno Marshall Matley, the bankrupt could by any means have transferred prior to October 24, 1940."

and also after ruling that

> "3. Homestead rights of Mrs. Matley as against the Trustee, vested on October 24, 1940, with the rights, remedies, and powers of a cred-

itor holding a lien by legal or equitable proceedings upon the property claimed as a homestead.

"Under the doctrine of Hawthorne v. Smith, 3 Nev. 164, Mrs. Matley's homestead declaration filed November 20, 1940, would be effective to prevent a sale of the property by a creditor holding such a lien. Insofar as the Trustee merely stands in the shoes of such creditor, the homestead declaration would be effective to prevent a sale under the lien."

The referee, as a matter of law, erred in denying the petition of your petitioner herein with reference to said real property in the face of the facts found by the referee and the facts shown by the record.

The referee erred as a matter of law in said ruling by failing to give due weight to the equities in favor of your [34] petitioner herein and by failing to give due weight to the uncontradicted evidence as to the intentions and actions of the bankrupt herein as the same affected your petitioner's claims to said real porperty and the exemption thereof as a homestead.

III.

That unless the execution and enforcement of said order be stayed and suspended and all further action, with reference to the property referred to in said order by said referee and/or the Trustee in Bankruptcy appointed in this case be stayed and

suspended pending this appeal and until the final termination thereof, petitioner herein will be seriously and irreparably damaged and will lose the said property and her rights therein.

Wherefore, petitioner prays that the said order be reversed by the Judge of the above-entitled court and that an order be entered declaring that said property is exempt and that same shall be set aside and recognized as a homestead and that the objections of the said trustee to the petition of Verna May Matley, claiming said exemption be overruled and that the prayer of said petition be granted; further, that pending this appeal and review and until the final termination thereof, the said order appealed from be stayed and suspended.

Dated: June 19, 1941.

VERNA MAY MATLEY,
Petitioner.
W. M. KEARNEY,
ROBERT TAYLOR ADAMS,
Attorneys for said
Petitioner. [35]

State of Nevada,
County of Washoe—ss.

Verna May Matley, being first duly sworn, deposes and says: That she is the petitioner above named; that she has read the foregoing Petition for Review and knows the contents thereof; that the same is true of her own knowledge, except as to those mat-

ters therein stated on information and belief, and as to those matters she believes it to be true.

VERNA MAY MATLEY

Subscribed and sworn to before me this 19th day of June, 1941.

[Notarial Seal] GEORGIA NEWMAN,
Notary Public in and for the County of Washoe, State of Nevada.

My Commission expires: May 22, 1944.

Service by copy admitted this 21st day of June, 1941.

H. W. EDWARDS

[Endorsed]: Filed June 21, 1941. Arthur F. Lashey, Referee in Bankruptcy.

[Endorsed]: Filed July 16, 1941. O. E. Benham, Clerk. [36]

In the District Court of the United States of America, in and for the District of Nevada.

No. 683 in Bankruptcy

In the Matter of MARSHALL RENO MATLEY, formerly doing business under the name and style of MATLEY'S FOOD STORE,

Bankrupt.

OPINION AND DECISION.

Norcross, District Judge:

This is an appeal from an order of the Referee denying the petition of the wife of the Bankrupt that certain premises in the City of Reno be declared exempt and set aside and recognized as a homestead. The denial of the petition is based on one of the grounds of objection stated by the Trustee: "That no declaration of homestead as required by law was filed * * * prior to the filing of the petition in bankruptcy herein on the 24th day of October, 1940."

The salient facts appear to be the following: That certain creditors filed a petition in involuntary bankruptcy October 24, 1940. On the same date the alleged bankrupt filed an answer to the petition admitting the material allegations thereof and, thereupon, an order was entered adjudging him to be a bankrupt. Pursuant to an order of the Referee, the Bankrupt on November 6, 1940, filed schedules of his debts and assets with the Referee in which

was listed the real property in question but no claim of homestead exemption, in respect thereto, was by him made therein. At the first creditors meeting held November 8, 1940, a trustee was elected and qualified. On November 27, 1940, Verna [37] May Matley, wife of the bankrupt, filed a petition claiming a homestead on the premises in question. The bankrupt and petitioner, his wife, were married April 22, 1931. The property, comprising the claimed homestead including the home and other improvements constructed thereon, was acquired from their earnings after their marriage and, hence, was community property. At the time of instituting the proceedings in bankruptcy the property was free of incumbrance and was occupied by the wife of the bankrupt, the said parties theretofore having separated and were then living separate and apart. A declaration of homestead in due form was acknowledged and filed by Mrs. Matley November 20, 1940, and recorded in the records of Washoe County, Nevada.

The decision of the Referee is based on the decision of the Supreme Court in White v. Stump, 266 U. S. 310, 69 L. Ed. 301, and that of the Circuit Court of Appeals of this Ninth Circuit in Georgouses v. Gillen, 24 Fed. (2d) 292. The White v. Stump case, supra, involved a construction of statutes of the State of Idaho respecting homestead exemption. In that case Stump was adjudged a bankrupt on his voluntary petition. He did not in

his petition or schedule claim a homestead exemption. Two months later the bankrupt's wife, with his assent, asked that the land be set apart as an exempt homestead for their joint benefit. This request of the wife was based on a declaration of homestead made and filed for record a month subsequent to the filing of the petition in bankruptcy. In reference to the Idaho law under consideration the Supreme Court said:

> "The laws of the State of Idaho, where the land is situate, provide for a homestead exemption, but only where a declaration that the land is both occupied and claimed as a homestead is made and filed for record, as therein prescribed. If the family consist of husband and wife, whether with or without children, either may make the declaration, * * * The exemption arises when the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents the sale under it."

In the case of Georgouses v. Gillen, supra, no question of a wife's rights in property subject to a homestead status was presented. [38]

Respecting certain of the respective rights of husband and wife in community property section 3360 of Nevada Compiled Laws—contains the following

provision: "The husband shall have the entire management and control of the community property, with like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate, provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate; * * *."

It is clear from the provision that in as far as a "homestead, as now defined by law," is concerned, the wife has equal rights not only in the community interest but, also, in that of the sale or incumbrance thereof.

In Brenemen v. Corrigan, 4 Fed. (2d) 225, the Circuit Court of Appeals of this Circuit said:

> "At its present term the Supreme Court of the United States distinctly adjudged that no provision of the bankruptcy law (Comp. St. 9585-9656) interferes with a state statute regarding homesteads. White v. Stump, 45 S. Ct. 103, 69 L. Ed. . . . The very purpose of the homestead laws is to secure a home and protection for husband, wife, and children against adverse fortune and should always be liberally construed."

In the White v. Stump case, supra, the Supreme Court in its opinion further stated:

"* * *; that the trustee shall be vested by operation of law with the title of the bankrupt to all property, in so far as it is not exempt, which, 'prior to the filing of the petition,' he could by any means have transferred, or which might have been levied upon and sold under judicial process (sec. 70a). * * *.

"These and other provisions of the Bankruptcy Law show that the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. * * * When the law speaks of property which is exempt and of rights to exemptions, it of course, refers to some point of time. In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control; and with respect to which the status and rights of the bankrupt, the creditors, [39] trustee in other particulars are fixed. The provisions before cited show—some expressly and others impliedly—that one common point of time is intended, and that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as to that time, save only as to 'property which is exempt' (Sec. 70a). The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is, under the State

Law, a present right of exemption,—one which withdraws the property from levy and sale under judicial process."

Section 3315 of Nevada Compiled Laws, section 1 of an Act entitled: "An Act to exempt the homestead and other property from forced sale in certain cases," approved March 6, 1865, as amended, Stats. 1879, 140, reads:

"The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its improvements, not exceeding in value five thousand dollars, to be selected by the husband and wife, or either of them, * * * shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred * * *, except process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists. Said selection shall be made by either the husband or wife or both of them, * * * declaring their intention in writing to claim the same as a homestead, * * * which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the

filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants; * * *."

The law appears to be well settled by the State Courts of Nevada that the filing of a declaration of homestead at any time before a sale under execution is a filing in time to protect homestead rights and exemptions. Hawthorne and Wife v. Smith, 3 Nev. 182; Lachman v. Walker, 15 Nev. 425; Nat. Bank of Ely v. Meyers, 39 Nev. 235; 150 Pac. 308; Idem 40 Nevada 284; Nevada Bank of San Francisco v. Treadway and Wife, 17 Fed. 887.

It is the conclusion of the Court that the Statutes of Nevada respecting homestead exemption, brings this case within the rule applied by the Circuit Court of Appeals of the Fifth Circuit in Clark v. Nirenbaum, 8 F. (2d) 451, and that the law of this State applied to the controlling facts of this case [40] distinguishes the same from the facts and the law applicable thereto in case of Georgouses v. Gillen supra.

The order of the Referee denying the petition of Verna May Matley respecting homestead exemption is reversed.

Dated this 25th day of November, 1941.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed November 25, 1941. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that G. E. Myers, Trustee in the above entitled bankrupt estate, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Order and/or Judgment of Court entered on the 26th day of November, 1941, reversing the order of the Referee in Bankruptcy denying the petition of Verna May Matley respecting the homestead exemption claimed by said Verna May Matley.

Dated this 3rd day of December, 1941.

PAINTER, WITHERS & EDWARDS

By T. L. WITHERS

Attorneys for Appellant.

[Endorsed]: Filed Dec. 4, 1941. [42]

[Title of District Court and Cause.]

APPELLANT'S CONDENSED STATEMENT OF FACTS.

An involuntary petition in bankruptcy was filed by certain creditors against Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, on the 24th day of October, 1940, on which day the alleged bankrupt filed

an answer to the petition admitting the material allegations thereof, and upon which day an order was entered adjudging him to be bankrupt.

Thereafter, pursuant to order of the Referee, the bankrupt filled his schedules on November 6, 1940, in which the bankrupt listed the real property in question; the said schedules showing that said property was subject to a mortgage. The bankrupt failed to make or file any claim of homestead.

That the first meeting of creditors was held on November 8th, 1940, on which day G. E. Myers was duly elected trustee and qualified as such, and ever since said day has been the duly [43] elected, qualified and acting trustee of said estate.

That Verna May Matley, wife of the bankrupt, on November 27, 1940, filed a petition claiming a homestead on the premises in question.

That the trustee's report on the homestead claim of Verna May Matley was filed December 16, 1940, refusing to allow said homestead claim.

That hearings were held before the Referee in Bankruptcy on said claim of Verna May Matley on December 6th and December 16th, 1940, at which hearings the evidence showed:

That the bankrupt and said Verna May Matley were married on the 22nd day of April, 1931, and that the property located in Reno, Nevada, upon which homestead was claimed, was acquired from their earnings after their marriage and was community property. Subse-

quently, they constructed a home on said property.

That after building said residence, the same was occupied by the said bankrupt and his said wife as a home for approximately one (1) year and two (2) months and until 1936, when the bankrupt and his wife worked at his father's ranch near Wadsworth, Nevada, and about April, 1940, the bankrupt and his wife removed from Wadsworth to Fernley, Nevada, as a business venture, where the bankrupt acquired an equity of about $700.00 in a ranch and acquired and operated a combination butcher shop, vegetable and country grocery store, the said ranch furnishing products which were disposed of in the store and butcher shop; that during said business venture, the parties occupied said ranch and the bankrupt's wife testified that they considered such occupancy temporary and rented the Reno property in the meantime with the intention of holding and returning to it, and that at all times she and the bankrupt considered the Reno property to be their home.

That during the summ of 1940 the petitioner and her husband, the bankrupt, separated as a result of matrimonial difficulties; that the petitioner left Fernley and returned to Reno in July of 1940 and re- [44] quested the tenants of said property to vacate the same as she de-

sired to occupy it; that the tenants thereof vacated the same on October 21st, 1940, and the petitioner moved into the premises on or about October 22nd, 1940.

That the petitioner was residing in said house on October 24th, 1940, the date of the filing of the petition in bankruptcy herein, and on November 20th, 1940, the date of the recordation of petitioner's declaration of homestead; that, the petitioner and her husband, the bankrupt herein, have no children, and that during the occupancy of said dwelling by the petitioner beginning on October 22nd, 1940, and continuing until after the filing of petitioner's declaration of homestead on the 20th day of November, 1940, a divorce action was pending between the petitioner and her said husband, the bankrupt herein, and that petitioner occupied said house alone during said period; that during said period reconciliations were believed possible and attempted by the parties but were unsuccessful; that on May 16, 1941, Verna May Matley was granted a decree of divorce from her husband, the bankrupt herein, on the ground of extreme cruelty, said decree, among other things, stating:

"It Is Further Ordered, Adjudged and Decreed that all of the common or community property belonging to plaintiff, Verna May Matley, and the defendant, Marshall Reno Mat-

ley, be and the same is hereby set over and awarded to the plaintiff, Verna May Matley, to be her sole and separate property, henceforth, which shall include, among other things, the homestead of the parties hereto occupied by plaintiff and defendant for several years as a home and claimed as a homestead, said premises being known as 316 Caliente Street, Reno, Nevada, and described as Lot 11, Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada."

That said G. E. Myers, as receiver or trustee, was not a party in said action and the question of the respective rights of said petitioner and said G. E. Meyers, as receiver or trustee, were not litigated therein.

That on June 1st, 1941, the Referee in Bankruptcy filed his Opinion denying the homestead claim of said Verna May Matley.

That on the 19th day of June, 1941, the petitioner, Verna May Matley, filed an amended appeal and petition for review.

That thereafter the petitioner and the trustee filed briefs, [45] and the matter was argued before the United States District Court on the 8th day of November, 1941.

That on the 25th day of November, 1941, the Court filed its Opinion and Decision reversing the Referee's ruling and gave judgment granting said homestead exemption to the petitioner, Verna May Matley.

That on the 4th day of December, 1941, the trustee filed his Notice of Appeal herein.

Respectfully submitted.

PAINTER, WITHERS & EDWARDS,
By T. L. WITHERS,
Attorneys for Appellant.

Service of the foregoing Appellant's Condensed Statement of Facts, by copy, is hereby admitted this 12th day of January, 1942.

WM. KEARNEY &
ROBERT TAYLOR ADAMS.

It Is Stipulated that the Appellant's Condensed Statement of Facts filed herein on December 11, 1941, be hereby withdrawn and the foregoing Condensed Statement of Facts substituted therefor, and that the above and foregoing statement of facts, together with the parts of the record and proceedings as heretofore filed by appellant (with the exception of the said statement of facts filed herein on December 11, 1941) may be included in the record on appeal.

ROBERT TAYLOR ADAMS.

[Endorsed]: Filed Jan. 13, 1942. [46]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY APPELLANT ON APPEAL

The sole question involved in this appeal is whether, under the law of the State of Nevada, Verna May Matley, wife of the bankrupt, is entitled to have a certain dwelling house exempted as a homestead, in view of the fact that the bankruptcy petition was filed on October 24th, 1940, and no declaration of homestead was filed until November 20th, 1941.

Respectfully submitted:

PAINTER, WITHERS & EDWARDS,
By T. L. WITHERS,
Attorneys for Appellant.

Service, by copy, of the foregoing Statement of Points Relied upon by Appellant on Appeal is hereby admitted, this 10th day of December, 1941.

WM. KEARNEY &
ROBERT TAYLOR ADAMS,
Attorneys for Appellee.

[Endorsed]: Filed Dec. 11, 1941. [47]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT.

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the Matter of Marshall Reno Matley, formerly doing business under the name and style of "Matley's Food Store", Bankrupt, said matter being No. 683 on the bankruptcy docket of said Court.

I further certify that the attached transcript, consisting of 52 typewritten pages numbered from 1 to 52, inclusive, contains a full, true and correct transcript of the proceedings in said matter and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the "Designation of Contents of Record on Appeal" filed in said matter and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid. [51]

And I further certify that the cost of preparing and certifying to said record, amounting to $20.90, has been paid to me by Messrs. Painter, Withers & Edwards, attorneys for the appellant herein.

Witness my hand and the seal of said United States District Court this 22nd day of January, 1942.

(Seal) O. E. BENHAM,
Clerk, U. S. District Court.

[52]

[Endorsed]: No. 10028. United States Circuit Court of Appeals for the Ninth Circuit. G. E. Myers, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, Bankrupt, Appellant, vs. Verna May Matley, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed January 24, 1942.

PAUL P. O'BRIEN,
Clerk of the United States District Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10028

In the Matter of

MARSHALL RENO MATLEY, formerly doing business under the name and style of "MATLEY'S FOOD STORE,"

Bankrupt.

G. E. MYERS, Trustee in Bankruptcy,

Appellant,

vs.

VERNA MAY MATLEY, Petitioner,

Appellee.

STATEMENT OF POINTS RELIED UPON BY APPELLANT ON APPEAL AND DESIGNATION OF PARTS OF THE RECORD NECESSARY ON APPEAL.

The sole questions involved in this appeal are whether, under the laws of the State of Nevada, Verna May Matley, wife of the bankrupt, is entitled to have a certain dwelling house located at 316 Caliente Street, Reno, Nevada, set aside to her as a homestead, in view of the facts:

1. That the bankruptcy petition was filed herein on October 24th, 1940, and no declaration of homestead was filed by either the said Verna May Matley

or by Marshall Reno Matley, the bankrupt, until November 20th, 1940.

(See Petition in Bankruptcy and Appellee's Declaration of Homestead.)

2. That while said declaration of homestead is in the form prescribed by statute, the actual facts do not support the declaration in that:

(a) The facts show that said property was not occupied, used and considered as a homestead by the petitioner.

(b) That at the time of filing said declaration petitioner was living separate and apart from her husband, the bankrupt herein, and has subsequently been divorced from her said husband.

(c) That at the time of filing said declaration of homestead petitioner was living alone in said house and was not the head of a family as set forth therein.

(See Appellant's Condensed Statement of Facts and Appellee's Declaration of Homestead.)

The Appellant further designates the following parts of the record to be printed which he believes necessary for the consideration of the foregoing Points Relied Upon By Appellant on Appeal:

1. Petition in Bankruptcy, filed October 24, 1940.
2. Declaration of Homestead of Verna May Matley.
3. Appellant's Condensed Statement of Facts.

4. Petition of Verna May Matley, filed November 27th, 1940.

5. Trustee's Report on Exemption Claim of Verna May Matley, filed December 16th, 1940.

6. Opinion of Referee in Bankruptcy, filed June 1st, 1941.

7. Amended Appeal and Petition for Review.

8. Opinion and Decision of United States District Court, filed November 25th, 1941.

9. Notice of Appeal.

Respectfully submitted.

PAINTER, WITHERS & EDWARDS,
By T. L. WITHERS,
Attorneys for Appellant.

Service, by copy, of the foregoing Statement of Points Relied upon by Appellant on Appeal, and Designation of Parts of the Record Necessary on Appeal now on file in the above entitled Court and Cause, is hereby admitted, this 23rd day of January, 1941.

WM. KEARNEY and
ROBERT TAYLOR ADAMS,
Attorneys for Appellee.

Reserving all rights to object thereto.

[Endorsed]: Filed Jan. 26, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED.

Verna May Matley, appellee above named, hereby designates as a portion of the record which she thinks material and which should be printed, that paper entitled: "Statement of Points Relied Upon By Appellant on Appeal"; said paper having been filed in this case with the Clerk of the district court for the District of Nevada on December 11, 1941 and appearing at page 47 of the original certified typewritten record forwarded by said Clerk and now on file with the Clerk of the above-entitled court.

VERNA MAY MATLEY,
Appellee,
By WM. KEARNEY,
ROBERT TAYLOR ADAMS,
Her Attorneys.

[Endorsed]: Filed Jan. 29, 1942. Paul P. O'Brien, Clerk.

No. 10028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. E. MYERS, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of MATLEY'S FOOD STORE, Bankrupt,

Appellant,

vs.

VERNA MAY MATLEY,

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 22, 1942.

Before: Garrecht, Denman and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. T. L. Withers, counsel for appellant, and by Mr. Wm. M. Kearney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, September 15, 1942.

Before: Garrecht, Denman and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion and dissenting opinion this day

rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon appeal from the District Court of the United States for the District of Nevada

OPINION

Before: Garrecht, Denman and Healy, Circuit Judges.

Healy, Circuit Judge.

On October 24, 1940, an involuntary petition in bankruptcy was filed against Marshall Reno Matley, appellee's husband; and on the same day, with Matley's consent, he was adjudicated a bankrupt.

On November 20, 1940, appellee filed with the recorder of Washoe County, Nevada, a declaration claiming as a homestead certain premises, consisting of a residence lot in Reno, listed by her husband in his bankruptcy schedules. On November 27, 1940, appellee filed her petition claiming the premises as exempt. The petition was denied by the referee; but upon review by the court the referee's order was reversed, and the trustee appeals.

Appellee and the bankrupt were married in 1931. The Reno property was acquired from their earnings after marriage and was community property.

Subsequent to the acquisition of the lot the Matleys built a residence thereon and occupied the same as a home until 1936, when the two went to work for the bankrupt's father on a ranch near Wadsworth, Nevada. In April 1940 they moved to Fernley where for a brief time the bankrupt operated a small country store. It is in evidence that the absence of the Matleys from the home in Reno was of a temporary nature and that at all times they considered it to be their home and intended to return to it.

During the summer of 1940 the couple separated, and in July appellee returned to Reno and requested the tenant living in the house to vacate. On vacation by the tenant on October 21, 1940, appellee occupied the place and was residing there at the time of the filing of the bankruptcy petition and thereafter, although the bankrupt did not join her. The couple have no children. During the period immediately in question a divorce action was pending between them, although a reconciliation was believed possible and was being sought by the parties. However, in May 1941 appellee was granted a divorce, and by the decree the Reno home was set aside for her as her sole property.

The question before us is whether, in light of the fact that the homestead declaration was not filed until after the filing of the bankruptcy petition, the wife is entitled to have the property excluded as exempt.

By §6 of the Act (11 USCA §24) bankrupts are allowed the exemptions prescribed by the state laws in force at the time of the filing of the petition. Article IV, §30, of the Constitution of Nevada, provides: "A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife when that relation exists, . . . and laws shall be enacted providing for the recording of such homestead within the county," etc. Section 3315 of the Compiled Laws of Nevada prescribes, in substance, that the homestead selected "shall not be subject to forced sale on execution, or any final process from any court," for any debt or liability, except certain obligations not here pertinent. The selection may be made either by the husband or the wife, and the declaration is required to state that they, or either of them, are residing on the premises at the time and claim the same as a homestead. The declaration must be acknowledged and recorded as conveyances affecting real estate.

The Nevada decisions hold that the filing of a declaration of homestead at any time before sale, although after levy, forestalls sale on execution. Hawthorne v. Smith, 3 Nev. 164. Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt. Lachman v. Walker, 15 Nev. 422.

We have to determine whether White v. Stump, 266 U. S. 310 (1924), is controlling. The court there held, on consideration of the Idaho law, that

the bankrupt's declaration of homestead came too late where not placed of record until after the filing of the bankruptcy petition. The state statute (Idaho Code, §54-1206) provided that "from and after the time the declaration is filed for record the premises therein described constitute a homestead." The local decisions, differing from those of Nevada, were to the effect that the filing of a declaration does not operate to avoid a prior attachment or execution levy. The Supreme Court stressed the then provisions of §70a of the Bankruptcy Act to the effect that the trustee shall "be vested by operation of law with the title of the bankrupt, . . . except insofar as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." It was thought that when the law speaks of property which is exempt it refers to some point of time, and that the point of time intended is the date of the filing of the petition. Said the court, "the bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt,' §70a. The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which withdraws the property from levy and sale under judicial process."

In Georgouses v. Gillen, 24 F. 2d 292 (1928), this court, following White v. Stump, supra, held ineffective a homestead declaration filed by the bankrupt after the initiation of the bankruptcy proceeding. The Arizona homestead statute and decisions involved in that case were substantially to the same effect as those of Nevada. The court believed that notwithstanding the difference between the Arizona and Idaho statutes there was no escape from the law as declared in White v. Stump. It thought that the 1910 amendment of §47 of the Bankruptcy Act (a provision now incorporated in subdivision (c) of §70, 11 USCA §110c)[1] did not diminish the title vested in the trustee by virtue of §70a, but was intended to place the trustee in a position superior to that which he would oc-

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[1] "The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

The foregoing quotation is from the Chandler Act. The phraseology differs somewhat from that previously contained in §47.

cupy merely as a constructive grantee of the bankrupt.

Since those two cases were decided the bankruptcy statute has been amended, Act of June 22, 1938, 52 Stat. 879, 11 USCA §110. As the statute now reads the trustee is vested with the title of the bankrupt, as of the date of the filing of the petition, "except insofar as it is to property *which is held to be exempt.*" Plainly, the phrase "which is held to be exempt" has no reference to a specific point of time. As it stands §70a(5), 11 USCA §110a(5), serves as a sort of catch-all, descriptive generally of the species of property passing to the trustee on the initiation of the proceeding. The statute has no bearing on the subject of exemptions. The problem as to what property should be held exempt is simply left at large, and its solution must be sought elsewhere in the law. We entertain no doubt that now, as heretofore, the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under the present law the opportunity to identify or select exempt property is irretrievably cut off as of that date. Consult Clark v. Nirenbaum, 5 Cir., 8 F. 2d 451 (1925), where it was held that even under the doctrine of White v. Stump the formal selection of the homestead may be made after bankruptcy. See also In re Bass, Fed. Cas. No. 1091, approved in Lockwood v. Exchange Bank, 190 U. S. 294. We think, more particularly in view of the

amendment, that the rule of White v. Stump should not be applied so broadly as this court felt constrained to apply it in Georguoses v. Gillen, supra.

But these considerations aside, the condition of the Nevada law in respect of the wife's right of homestead is such as to differentiate this case from either of the two cases discussed. Section 3360 of the Nevada Compiled Laws reads: "The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of *a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not,* shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same . . . ." [Emphasis supplied.]

This statute, enacted in 1897, long after the passage of the homestead statute, has been said to manifest a legislative policy precluding "the possibility of a wife being divested of the home by the acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent business transactions in which she had no part." First National Bank of Ely v. Meyers, 39 Nev. 235, 247, 150 Pac. 308, 312.[2] The court stated (39 Nev. 245) that "the homestead sought to be

[2]See same case on rehearing, 40 Nev. 284, 161 Pac. 929.

recognized and protected by the act of 1897 is not the homestead 'provided by law' . . ., but is the homestead de facto, so to speak, created by its being the abiding place of the husband and wife." The facts of that case were that Meyers and his wife had made their home on certain community property in the town of Ely. Meyers borrowed money from a bank and gave as security a mortgage on the property, executed by himself alone. Later the wife filed a declaration of homestead. The court held that though the homestead had not previously been registered as required by law, the husband's sole conveyance or encumbrance of it could not pass title.

Thus, in the situation and for the purposes contemplated by this statute, a de facto homestead right subsists in the wife prior to the filing of a declaration. We think it inescapable that if regard be had for the state law the wife, at least, is not to be surprised into the loss of the right, whether by the husband's voluntary transfer or by his or his creditor's petition in bankruptcy. But, appellant argues, the wife's unperfected right of homestead may be wiped out by the process of levy and sale, as is recognized in Bank of Ely v. Meyers, 161 Pac. 929, 932; and, since §70a(5) vests in the trustee the title to all the bankrupt's property which prior to the filing of the petition "might have been levied upon and sold under judicial process against him," the trustee must be deemed to

occupy the position or to possess the title of a purchaser at execution sale.

The short answer to the argument is that the statute does not purport to place the trustee in the shoes of an execution purchaser, Cf. Georgouses v. Gillen, supra, p. 293; In re Britannia Mining Co., 203 F. 450, 453; 11 USCA Sec. 110c. Nor is White v. Stump, supra, authority for the proposition that the trustee is deemed to have the title of such a purchaser. Moreover, if the premise were accepted it would substantially nullify in bankruptcy many exemptions provided for in the state laws. It is common state policy to exempt a limited value or number of articles of personal property of a given class, such for example as two horses, one milk cow, or the like, to be selected by the debtor out of the larger mass of like kind of property when occasion therefor arises. Until the selection is made —and there is often no statutory machinery for making it—the exemption statute is as a matter of practical necessity no impediment to levy and sale; and it appears to be the general view of the state courts that in the absence of timely selection a sale on execution wipes out the exemption privilege.[3] We are not told how, in cases of provisional exemptions of this character, the right of selection is retained as against a trustee in bankruptcy if the latter is clothed by law with the title of an

[3]See discussion of the general subject in 22 American Jurisprudence under the heading "Exemptions," §§114 to 140.

execution purchaser as of the date of bankruptcy. Yet it is not denied that the privilege of making the selection in such cases remains with the bankrupt and may be exercised pursuant to §7(8) of the Bankruptcy Act, 11 USCA §25(8). Consult Clark v. Nirenbaum, supra; In re Bass, supra; Bank of Nez Perce v. Pindel, 9 Cir., 193 F. 917.

The general exemption law of Nevada, §8844 Compiled Laws, lists as exempt numerous articles of personal property, not identifiable except through the process of selection. It is significant that subdivision 15 of that statute likewise lists, as among the kinds of property which "is" exempt from execution, "the homestead as provided for by law."[4] So far as concerns the bankruptcy law, there is no real difference between these two types of exemptions. Mere seizure of the property does not preclude exercise of the right of selection or designation in either case. As to both types of property the right of selection is lost unless exercised prior to judicial sale. A proper regard for the spirit of the bankruptcy law requires that these humanitarian rights, recognized and protected by the state, be not frittered away by technical refinements or synthetic buildups of unrelated statutory phrases.

Appellant argues further that that Nevada statute, §3315, contemplates only a family exemption, and that a wife who has separated from her hus-

[4]This particular subdivision was incorporated in the statute by amendment in 1911.

band and is living on the property without children or other dependents is not entitled to file a homestead declaration. The point was not made or considered below. In any event it is out of harmony with the language and spirit of the homestead law.

Affirmed.

Denman, Circuit Judge:

(A) The court has decided an important question of local law of Nevada with respect to the right of a wife in a homestead prior to a transfer by operation of the Nevada law, similar to the transfer by operation of law on the filing of a petition in bankruptcy, where the wife has taken no steps to create the homestead prior thereto, in conflict with the applicable Nevada decisions to the contrary.

This is a dissent to the holding of the majority that the transfer by operation of law under §70a of the Bankruptcy Act is the same as a voluntary transfer by the husband to some third party and that therefore a homestead exemption is created without the necessity of making and filing a declaration. For this holding the majority relies on a dictum in the decision of First National Bank of Ely v. Meyers, 39 Nev. 235, 150 P. 308.[1] That deci-

[1]But two judges participated in this decision. On rehearing one of the judges carefully distinguishes between a transfer by operation of law in an execution sale in a suit by creditors and the

sion considered the provision concerning the voluntary transfer by the husband of community property as provided in §3360 of the laws of Nevada. N. C. L. 1929. The pertinent portions of the statute read:

> "The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatsoever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate; * * *."

That the majority opinion necessarily holds this identity between the transfer by operation of law

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mortgaging of the home by a husband, stating "This is but a reannunciation of an old principle. It does not apply to our particular statute, because our statute says nothing as to selection or recordation as affecting the rights of the wife as against those of the husband. Recordation may be, and in fact is, necessary to give notice to all the world of the selection of the homestead to exempt it from forced sale under execution. But to exempt it from alienation by one spouse without the consent of the other, in the absence of specific constitutional or statutory provision, why should such be necessary?" First Nat. Bank of Ely v. Meyers, 40 Nev. 284, 297.

under the Bankruptcy Act and the voluntary conveyance by the husband referred to in §3360, is apparent when we consider that the majority refuses to entertain the principal contention of the appellant trustee and the latest decision of the Nevada supreme court on which his contention is based.

The trustee's contention is that in Nevada the transfer by operation of law on an execution sale is entirely different from the voluntary transfer by the husband, and that the two transactions are governed by entirely different Nevada statutes. These statutes distinguish between the rights, as in bankruptcy, of creditors on a transfer by operation of law, and the rights of the transferee on the voluntary conveyance by the husband. The former rights are determined by §3315 of the homestead statute, and the latter by an entirely different statute, §3360, under the Nevada community property laws.

Under no theory could the majority have refused to consider this latest Nevada decision other than that the Bankruptcy Act itself made the transfer of title from the bankrupt to the trustee, by operation of law, identical with a voluntary transfer by the husband prior to bankruptcy.

The case which the majority refuses to consider as relevant to its decision is McGill v. Lewis, 116 P. (2d) 581, 583, decided August 30, 1941. In that case there had been a transfer by operation of the

Nevada law on an execution sale in a suit brought by creditors against the husband. The wife, prior to the sale, had made a so-called recordation of a document which did not comply with the state statutory requirements of a homestead declaration. The court held that upon such a transfer by operation of law, the purchaser under execution in the suit by the creditors took free and clear of any right of the wife to create a homestead in the property conveyed, unless prior thereto there had been a recordation substantially complying with the homestead statute. This decision limits the "solicitude" of the Nevada law to protect the homestead, on which the majority relies, as follows:

> "This court agrees with appellants that our constitutional and statutory provisions relating to homesteads should be liberally construed, but the rule of liberal construction can be applied only where there is a *substantial compliance* with those provisions." (Emphasis supplied).
>
> McGill v. Lewis, supra, 583.

In so holding the Nevada court reaffirmed its decision in Lachman v. Walker, 15 Nev. 422, where, as here, the homestead recordation was made after a transfer by operation of law.

Also, in so holding, the Nevada supreme court distinguishes the transfer by operation of law in a suit by creditors, from a voluntary transfer by the husband in mortgaging property, in a considera-

tion of the case of First National Bank of Ely v. Meyers, supra, which is made the basis of the majority opinion, as follows:

> "To secure the benefits of the constitutional and statutory provisions exempting the homestead from forced sale under process of law (with certain exceptions not here pertinent), it is necessary that a declaration of homestead be filed for record as provided in §3315, N. C. L., 1929. Lachman v. Walker, 15 Nev. 422. The case last cited was not overruled in First National Bank of Ely v. Meyers, 39 Nev. 235, 150 P. 308; Id., 40 Nev. 284, 161 P. 929. In that case, it is true, no declaration for homestead was filed for record but the question before the court was not as to the exemption of the homestead from forced sale; it was whether the husband alone could mortgage the homestead occupied by him and his family. * * *"

McGill v. Lewis, supra, 582-583.

Since the trustee stands in the place of the creditors and the bankrupt, what White v. Stump, 266 U. S. 301, decides is that the creditors have had transferred to them by operation of law on the filing of the petition in bankruptcy, exactly what would be acquired by operation of law in Nevada on an execution sale in a suit by the creditors against the bankrupt prior to the filing of his petition. That is to say, a title free and clear of any

right of the wife thereafter to create a homestead in the property so transferred. This is the holding made by the referee in bankruptcy which was overruled by the district court. In my opinion, the referee's holding is correct and the trustee should have prevailed on his appeal here.

(B). The Court has decided an important federal question of first impression, to-wit, an amendment to bankruptcy law, in conflict with White v. Stump, 226 U. S. 310, and the applicable decisions of the United States Supreme Court.

This dissent is also to the holding that the Act of June 22, 1938, in amending the phrase "except in so far as it is to property which *is* exempt," to read "to property which is *held to be exempt*,"[2] changed the rule of White v. Stump, 266 U. S. 310, 313,[3] and is intended to permit the creation of an exemption after the filing of the petition in bankruptcy. Certainly it would be unusual for Congress to cause such a profound change in the many years of administration of the Act by such a three-word alteration in verbiage, without altering or referring to all the several other provisions summarized in White v. Stump, making the date of

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[2]§70a (5), 11 U. S. C. A. §110a (5).

[3]Reaffirmed in United States v. Marxen, 307 U. S. 200, 207, and followed by this court in Coopman v. Citizens State Bank of Omak, 83 F. (2d) 815, (C. C. A. 9).

filing of the petition "the point of time which is to separate the old from the new in the bankrupt's affairs." Id. 313.

The Act of 1938 makes a general clarification of the language of the Bankruptcy Act in many respects. In all there were more than 64 amendatory provisions. So far as concerns the original phrase excepting "property which *is* exempt," it did not fully describe the processes of the Act. Under §7 of the Act of 1898, on filing his petition in voluntary bankruptcy, or ten days thereafter in involuntary proceedings, the bankrupt is required to file his "*claim* of such exemptions as he may be entitled to." This claim it not one which "*is* exempt" merely by its filing with the petition. It has to be adjudicated as a proper exemption in the bankruptcy proceeding,—that is, it has thereafter to be "held to be exempt." In making such a general overhauling of the bankruptcy statute this seems the rational explanation of the amendatory phrase in question.

The majority opinion holds that in the words "held to be exempt," Congress had two entirely different purposes. One was to "ameliorate" the position of the wife, a third person, claiming a homestead. In this connection it should be noted that in White v. Stump, supra, the Supreme Court overruled the holding of this court In Re Stump, 284 F. 199, 203, that the wife was such a third person. The Supreme Court treats her claim as no different from her bankrupt husband.

To impute to the words "held to be exempt" such a creation of the wife's rights as a third party seems too extraordinarily obscure and roundabout a method for Congress to pursue to give it rational credence.

Here the attempted creation of the homestead by recording the claim was 27 days after the filing of the petition and adjudication. In White v. Stump it was 60 days thereafter. However, under the majority opinion the claimant could wait at his will to create his exemption. Bankruptcy estates often are months, sometimes years, in the course of administration. Finally, the creditors' claims being determined, all that is necessary for distribution is the sale of the estate's property. On the principle of the majority opinion, on the morning of the sale the homestead claim may be made by the wife or created by the statutory recordation of the husband. It does not seem a reasonable contention that the amendment of 1938 was intended to permit the creation by either the debtor husband or the third party wife of an exemption years after the filing of the petition. All the adjustments and settlements arrived at in the long proceeding well may be frustrated.

A second reason of the majority for treating the amendatory phrase as warranting the creation of an exemption after the filing of the petition is equally untenable. It is that the holding of White v. Stump that the exemption must exist when the petition is filed, prevents the selection of barber's

tool's farm implements, milch cows, lawyers' libraries, and the like, permitted by various exemption statutes of the several states. This is an astonishing discovery to make in 1938, after forty years of administration of the act in which there must have been scores of thousands of such exemptions claimed and allowed.

The fact is that unlike the futile claim of an unrecorded homestead in Nevada, these other statutory exemptions actually exist as to the title to the farm implements, etc., when, by operation of law, they are transferred to the trustee on the filing of the bankrupt's petition. Then, as at the time of the transfer by operation of law in an execution sale, the debtor files his designation of the items in the group exempted with the petition transferring his property by operation of law. The later designation in an involuntary bankruptcy relates back, as do his schedules, to the date of filing the creditors' petition.

In Nevada, Idaho and Arizona the judgment debtor must make this designation at or before the execution sale or the exemption is waived. Hammersmith v. Avery, 18 Nev. 225, 229; Idaho Code 8-202; Wilson v. Lowry, 5 Ariz. 335, 52 P. 777.

It would be a vain act to amend the bankruptcy statute by such a phrase as "which are held to be exempt" to give the debtor the right to designate the items of exempt property, when that right is already provided in the Act as it stood before the amendment. The obvious reason for that amend-

ment was that the former phraseology failed to recognize that the mere filing of a *claim* of exemption of property does not make that property something "which is exempt." As stated, the claim of property must be adjudicated when the property becomes "held" exempt.

The decision of the district court should be reversed.

[Endorsed]: Opinion and Dissenting Opinion. Filed September 15, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10028

G. E. MYERS, Trustee, etc.,

Appellant,

vs.

VERNA MAY MATLEY,

Appellee.

DECREE

Appeal from the District Court of the United States for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Nevada, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and Entered September 15, 1942.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, October 26, 1942.

Before: Garrecht, Denman and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court,—Denman, C.J. not concurring—It Is Ordered that the petition of appellant, filed October 7, 1942, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Painter, Withers & Edwards, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including November 30, 1942; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT
United States Circuit Judge

Dated: San Francisco, California, October 28, 1942.

[Endorsed]: Filed Oct. 28, 1942.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-seven (87) pages, numbered from and including 1 to and including 87, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of November, 1942.

[Seal] PAUL P. O'BRIEN,
Clerk

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 540

ORDER ALLOWING CERTIORARI—Filed January 4, 1943.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.